



TC06156

Appeal number: TC/2014/01388

INCOME TAX – self-assessment – penalty for failure to make returns – reasonable excuse – whether adequate notice of daily penalty – Finance Act 2009, sch 55

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AMANULAH BEHSODI

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE NICHOLAS PAINES QC

The Tribunal determined the appeal on 11 August 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal received on 11 March 2014 and HMRC's Statement of Case (with enclosures) received by the Tribunal on 23 March 2017. The appellant has not responded to the Statement of Case.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under
5 Schedule 55 to the Finance Act 2009 (“Schedule 55”) for a failure to submit [an
annual self-assessment return] on time.

2. The penalties that have been charged are as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on
12 February 2013

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 and

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55
imposed on 14 August 2013

3. The appellant’s appeal was notified to the Tribunal late. However, since HMRC
have not objected to the late notification, I give permission under the Taxes
15 Management Act 1970 for the appeal to be notified late.

4. The appeal was stood over pending the outcome of *Donaldson v HMRC* [2016]
EWCA Civ 761. Now that that case has been finally determined, this appeal falls to
be decided.

5. For the reasons given in this decision I confirm the penalties of £100 and £300.
20 I cancel the penalty of £900.

6. A paper tax return for the year 2011-12 was issued to Mr Behsodi on 6 April
2012. The filing deadline was 31 October 2012 for a paper return and 31 January
2013 for an electronic return. As no return had been filed, on 12 February 2013
HMRC issued a penalty assessment notice for £100 under paragraph 3 of the
25 schedule. On 27 February 2013 Mr Behsodi appealed against that penalty. His
grounds of appeal were that he had originally filled in the return on time but it was
rejected because it was incomplete; he filled in a replacement form, but that was
rejected because it did not state the tax year it related to. It had taken a while for the
two forms to be processed.

30 7. HMRC responded on 22 March 2013 saying that the appeal could not be
considered until the tax return was sent in; Mr Behsodi was asked to send it by 22
April. The letter warned that if the return was more than three months late, HMRC
would charge a penalty of £10 for each day that it remained outstanding. The text of
the warning was as follows:

35 **Daily penalties**

If your tax return is more than three months late, we will charge you a penalty
of £10 for each day it remains outstanding. Daily penalties may already be
building up. To stop the amount of daily penalties that we may charge you from
increasing, you can file your tax return online. For more information, go to
40 hmrc.gov.uk/online.

8. HMRC then sent a further decision on the appeal dated 2 July 2013. This said that Mr Behsodi did not have a reasonable excuse for the late filing because the return had still not been filed. The decision letter offered a review and told Mr Behsodi he could ask for a review or appeal to the tribunal by 1 August 2013. It also reminded
5 him that his tax return was still outstanding.

9. Mr Behsodi's tax return was filed electronically on 1 August 2013. On 24 September 2013 Mr Behsodi requested a review of the 2 July decision. His grounds for review were contained in an attached letter from a firm of accountants, which said that Mr Behsodi had filed a paper return on around 4 January 2013 which was
10 rejected because information was missing. He had to wait for another copy of the tax return to be sent to him before he could fill it in again. He should have three months from the time the second return was sent to him. The letter added that Mr Behsodi was taken into hospital and given four weeks off by the doctor.

10. HMRC conducted the review on 6 November 2013. The review decision was to
15 uphold the penalties. The decision-maker said that Mr Behsodi's return was received on 1 August 2013 and that there were no records of an earlier return being sent back as incomplete.

11. In a letter received by HMRC on 9 January 2014 Mr Behsodi appealed again. The letter said that from 9 November 2012 Mr Behsodi was in hospital having an
20 operation; he was not fit to work until January 2013. Before his operation he sent in the self-assessment form, but something was missing so it was sent back to him. He completed the form again and sent it on 4 January 2013. He could only think it had been mislaid in the post.

12. HMRC replied on 11 February 2014 saying that Mr Behsodi was only entitled
25 to have a decision reviewed once, but he could apply to the tribunal to accept a late appeal.

13. Mr Behsodi's Notice of Appeal was received by the tribunal on 11 March 2014. The amount being appealed against was stated as £1,200. In the grounds of appeal Mr Behsodi accepted that the paper return was sent to HMRC late, in early January 2013.
30 He could not understand why the accountant who worked out his profit for the tax year left him to fill in a paper return and could not process the return online by 31 January. He had been unable to get anything sensible from the accountant about the state and progress of the tax return. He had learned that the accountant could have processed a corrected return online by 31 April without the penalty increasing beyond
35 the initial £100. His profit for the year had only been £2,278 and he mostly survived with the help of the benefits system. He could not find the money to sue the accountant or to pay the penalties which had been caused by the accountant. He was a hard worker and begged for the fine to be limited to the initial £100.

14. In an e-mail to the tribunal of 19 March 2014 Mr Behsodi gave some reasons
40 why the appeal was sent in late.

15. HMRC say in their Statement of Case that they have no record of having received any return in respect of Mr Behsodi for 2012-13 prior to 1 August 2013. The receipt of an incomplete or unsatisfactory return would have been noted on their systems. They say that a taxpayer who employs an agent remains responsible for

ensuring that the return is filed on time and is liable for the automatic penalty if it is not. Any dispute between Mr Behsodi and his agent should be settled between them. Inability to pay the penalties did not amount to a reasonable excuse.

Decision

5 16. Relevant statutory provisions are included as an Appendix to this decision.

17. The penalty of £100 and the penalty of £300 were correctly imposed under paragraphs 3 and 5 of Schedule 55 to the Act. Under the legislation, in the absence of reasonable excuse or special circumstances, a penalty of £100 becomes due when a self-assessment tax return is not sent in by the due date, which in this case was 31
10 January 2013 for an electronic return. If (as here) the return has still not been filed 6 months after the due date (i.e. by 31 July 2013) a penalty of £300 becomes due.

18. I do not consider that Mr Behsodi had a reasonable excuse for the late filing. On his own case, his paper return was late and was sent back to him a second time because it was incomplete. It may be that his accountant let him down, but the fact
15 that a taxpayer engages a representative to file a return does not of itself give him a reasonable excuse if the representative defaults in doing so.

19. But the evidence does not satisfy me that Mr Behsodi was liable for daily penalties under paragraph 4 of the schedule. Under paragraph 4 a person is only
20 liable to daily penalties if HMRC (1) decide that a daily penalty should be payable and (2) give the taxpayer notice specifying the date from which the penalty is payable. The burden of proof that the preconditions for an assessment are satisfied rests upon HMRC: see *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC).

20. The first of those conditions is satisfied because HMRC took a decision in June
25 2010 that all taxpayers who were at least 3 months late in filing their returns should be liable to daily penalties under paragraph 4: see *Donaldson v HMRC* [2016] EWCA Civ 761.

21. But HMRC have not supplied any evidence that they gave Mr Behsodi notice that the penalties would be chargeable from any particular date. The only document
30 that I have seen that refers to liability for daily penalties is the letter of 22 March 2013 from which I have quoted at paragraph 7 above. HMRC have not suggested that any other notice of liability for daily penalties was sent. The letter of 22 March 2013 did not state any date from which the penalty was payable; indeed, it was equivocal as to whether penalties were already building up, and this as to whether that date had
35 passed or lay in the future. It is different from the documents that were held to satisfy the requirements of paragraph 4(1)(c) in the *Donaldson* case; they were found by the court to inform the taxpayer that he would be liable to a £10 penalty for every day after 31 January 2012 that the return was not filed.

22. The scheme of paragraph 4 of Schedule 55 is that a taxpayer may be liable for
40 daily penalties if his failure to file a return continues beyond the end of three months beginning with the penalty date. By virtue of paragraph 1(4) of the schedule, the penalty date is the day after the filing date and the filing date is the date by which the

return is required to be filed. By virtue of section 8(1D) of the Taxes management Act 1970, the filing date for a self-assessment return (and therefore the penalty date and also the date three months after that date) depends on whether the return is filed on paper or electronically.

5 23. I note that the date stated in a notice under paragraph 4(1)(c) of Schedule 55
may be earlier than the date of the notice (see paragraph 4(3)(b)), so that a notice
cannot be faulted on the basis that it states a date in the past. It may also be
permissible under paragraph 4(1)(c) (I express no view on this) for HMRC to notify
10 alternative dates from which a penalty is payable, depending on whether a future
filing is effected on paper or electronically but, even if so, the notice must tell the
taxpayer what those alternative dates are. All that the letter of 22 March did by way
of identifying the date from which Mr Behsodi's penalty was payable was by the
words "if your return is more than three months late".

15 24. Someone versed in section 8 of the Taxes Management Act could work out that
that meant if the return was filed on paper after 31 January 2013 or filed electronically
after 30 April 2013. But liability to a penalty under paragraph 4 is dependent, among
other things on HMRC giving notice "specifying the date from which the penalty is
payable. The terms of paragraph 4 are strict; the liability exists "if (and only if)"
20 HMRC, among other things, give notice specifying the date. Even assuming that
alternative dates can be specified in such a notice, they must at least be specified. A
general reference to a return being "late" is not in my judgment a specification of a
date.

25 25. The letter was also misleading in suggesting that, by filing an online return, Mr
Behsodi could stop the amount of daily penalties from increasing; the true position
was that if he had filed electronically by 30 April, the precondition for charging daily
penalties under paragraph 4(1)(a) would not have been satisfied at all.

30 26. I accept that this paragraph is a standard paragraph added to a letter written for
other purposes. In that context it is understandable that its terms are somewhat
general. It would be perfectly acceptable as a reminder of a liability that had already
been created by adequate notice. But in the absence of any other evidence that the
requirements of paragraph 4(1)(c) were complied with, I cannot conclude that it
complies with those requirements itself.

35 27. I have considered whether the letter could be said to be "in substance and
effect" in conformity with or in accordance with the intent of paragraph 4(1)(c) of
Schedule 55 for the purposes of section 114 of the Taxes Management Act. The
intent of paragraph 4(1)(c) is that the date be specified in a notice to the taxpayer. I
do not think it can be said to have the effect of a notice specifying a date on the
footing that its meaning can be worked out by resorting to section 8 of the 1970 Act.

Conclusion

40 28. I confirm HMRC's decision to charge penalties of £100 and £300 under
paragraphs 3 and 5 of Schedule 55. I cancel the daily penalty imposed under
paragraph 4.

29. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**NICHOLAS PAINES QC
TRIBUNAL JUDGE**

RELEASE DATE: 21 AUGUST 2017

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APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

5 2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

10 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

15 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

20 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

25 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- 5 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (a) for the withholding of category 1 information, 100%,
(b) for the withholding of category 2 information, 150%, and
(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

- 15 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (a) for the withholding of category 1 information, 70%,
(b) for the withholding of category 2 information, 105%, and
(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

- 25 (a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

30 5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

35 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

- 40 (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

5 6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

10 (2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

15 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20(1) of Schedule 55 gives a taxpayer a right of appeal to the Tribunal against a decision that a penalty is payable and paragraph 20(2) gives a right
20 of appeal as to the amount of a penalty. Paragraph 22 of the schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

22—

25 (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

30 (b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

35 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

40 (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

1.